CHAH SIEW KOK

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[CRIMINAL APPEAL NO. 207 OF 1984]
1 AUGUST 1986

CRIMINAL LAW AND PROCEDURE: *Trade Descriptions Act 1972 - Sections 3(1)(b), 18(1) - Criminal Procedure Code - Section 399 - Chemist's report served 10 days before trial - Defence gave notice 3 days before trial - Chemist's report admitted without chemist being called - No objection raised by defence during prosecution case but objection raised during defence case - Whether report admissible.*

The prosecution had served a copy of the chemist's report on the defendant/appellant 10 days before the commencement of the trial. The defence gave notice to the prosecution not less than 3 days before the commencement of trial for the calling of the chemist as a witness.

During the prosecution case the chemist's report was admitted in evidence and marked as an exhibit. The defence Counsel did not object to this. No objection was also raised during submission of no case to answer. However during the defence case the defence Counsel raised an objection. The objection was overruled.

The Magistrate convicted the defendant and fined him RM3,000, in default 8 months' imprisonment. The defendant appealed.

On appeal it was again contended that the chemist's report was inadmissible. The prosecution argued that because of defence Counsel's silence or inaction there was a waiver by the defence.

Held:

[1] If a chemist's report is admitted in contravention of s. 399 of the Criminal Procedure Code ("the Code"), it will be an irregularity of serious nature and the report in such circumstances is inadmissible evidence despite its admission.

[2] A waiver or an estoppel cannot be raised against s. 399 which imposes a duty on the prosecution to call the chemist as a witness. Further a waiver by an accused person cannot be held against him in regard to rules of procedure and evidence in criminal proceedings.

[3] Any admission of inadmissible evidence even with consent or by waiver of the defendant is wrongful and such inadmissible evidence remains inadmissible evidence, the effect of which is open to any Court to assess.

[4] In this case improper admission of evidence occasioned a failure of justice and therefore s. 422 of the Code will not help the prosecution.

[Appeal allowed. Conviction and sentence set aside.]

Cases referred to:
Mt. Gaya Kunnar v. The Emperor [1934] AIR Oudh 62
Emperor v. Happu [1933] 20 AIR All 837
Mohammed bin Abdul Rahman v. Pendakwa Raya [1979] 1 MLJ 252
Ang Chwee Keng v. Regina [1955] MLJ 37

Charles Rikards Ltd. v. Oppenhaim [1950] 1 KB 616
Public Textile Bhd. v. Lembaga Letrik Negara [1976] 2 MLJ 58
Kok Hoong v. Leong Cheong Kweng Mines Ltd. [1964] MLJ 49
Maritime Electric Co. Ltd. v. General Dairies Ltd. [1937] AC 610
Wong Kok Keong v. Regina [1955] MLJ 13

Legislation referred to:
Criminal Procedure Code, ss. 399, 422
Criminal Procedure Code [Ind], s. 510
Trade Descriptions Act 1972, s. 3(1)(b)

For the appellant - K. H. Ting
For the public prosecutor - Tun Abdul Majid bin Tun Hamzah, DPP

JUDGMENT

Peh Swee Chin J:

For the judgment I am about to deliver, I think ought to give detailed reasons which involve taking a critical look again at s. 399 of our Criminal Procedure Code, the subject of a great number of reported decisions the profusion of which I can only hope I would not add confusion to.

The charge against the defendant was as follows:

> That you on 8 October 1982 at about 5.30 p.m. at Messrs. Chah Joon Heng. Lot 2138 Mukim Pengkalan Baru, Batu 11, Pantai Remis, in the District of Manjong, in the State of Perak, in the course of business did offer to supply 4,550 litres of the gasoline motor (grade premium) to which a false trade description namely "PETROL' was applied, whereas the said petrol was adulterated with kerosine and that you have thereby committed an offence under s. 3(1)(b) of the Trade Descriptions Act 1972 and punishable under s. 18 (1) of the same Act (Act 87).

It will be apparent from the charge that it was incumbent on the prosecution to prove that what was seized in this case was in fact petrol adulterated with kerosine. Only an expert like a chemist could have proved that. Predictably, a chemist's report was admitted in evidence for this purpose. Without such chemist's report, there would have no reliable evidence that it was petrol adulterated with kerosine and the prosecution case would have fallen to the ground.

The prosecution had apparently and duly served a copy of that chemist's report on the defendant 10 days before the commencement of the trial. The defence, in an unusual but perfectly proper move, gave notice to the prosecution not less than 3 clear days before the commencement of trial that the chemist in question would be required by the defence to attend as a witness, i.e. for cross-examination.

What transpired subsequently was this. Before the end of the prosecution case, evidence of service of the chemist's report on the accused was given and the chemist's report was admitted in evidence and duly marked as an exhibit. Despite the earlier notice from the accused requiring the attendance of the chemist, there was no objection at all to such admission of the chemist's report or any mention of such earlier request by the defendant's Counsel. Neither the chemist was called to the witness box. In his submission of no case to answer, learned defence Counsel appears not to have raised any objection at all to the admission of the chemist's report. It was only after the defence was called, that the learned defence Counsel raised for the first time the objection to the admission of the chemist's

report in view of the previous notice requiring the chemist to be called. The objection appears, to have been promptly overruled. At the end of defence, the defendant was convicted and fined RM3,000 in default, 8 months' imprisonment.

Before me, on appeal, a number of points were canvassed, (and except for the objection which was renewed before me as regards the admissibility of the chemist's report), they were without merit after due consideration of the same.

Learned Counsel for the appellant submitted that the chemist's report was inadmissible in evidence. The learned Deputy, while appearing to concede that the chemist should have been called, submitted that there was a waiver by the defence in regard to the calling of the chemist in the circumstances stated above, i.e. because of defence Counsel's silence or inaction, when it was put in evidence. Therefore, he argued, the chemist's report was properly admitted. He appeared to suggest that he would not resist a retrial.

The crucial points in my view are whether the admission of the chemist's report without calling the chemist to the box in the circumstances of this case has contravened the provisions of s. 399 of the Criminal Procedure Code, and that if so, what the effect would be. Section 399 says:

> 399(1) Any document purporting to be a report under the hand of any of the persons mentioned in subsection (2) of this section upon any person, matter or thing examined or analysed by him or any document purporting to be a report under the hand of the Registrar of Criminals upon any matter or thing relating to finger impressions submitted to him for report may be given in evidence in any inquiry, trial or other proceeding under this Code unless such person or Registrar shall be required to attend as a witness -
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> (a) by the Court; or
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> (b) by the accused, in which case the accused shall give notice to the Public Prosecutor not less than three clear days before the commencement of the trial:
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> Provided always that in any case in which the Public Prosecutor intends to give in evidence any such report he shall deliver a copy thereof to the accused not less than ten clear days before the commencement of the trial.
>
> (2) The following are persons to whom the provisions of this sections apply:
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> (a) ...
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> (b) ...
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> c) chemists in the employment of any Government in the Federation or of the Government of Singapore;
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> (d) ...
>
> (e) ...
>
> (f) ...
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> (3) The persons referred to in subsection (2) of this section and the Registrar of Criminals are by this Code bound to state the truth in reports made under their hands.

Looking at s. 399, my view is that it represents a departure from the ordinary, rules of evidence by conferring a discretion on the Court, to allow the admission in evidence of such a report without calling the maker, and in the instant case, the chemist's report. The Court can conversely exercise its discretion to refuse its admission in evidence, despite the prior service of the same on a defendant, by requiring the attendance of the chemist in the box, or the

defence may so require by giving 3 previous days' notice. The section postulates the use in this manner of any of such reports in Criminal cases by the prosecution only, while the defence, if it is so minded, would have to content itself with having to call the chemist himself as a witness in the case where a defendant has not been served with copy of the chemist's report. The aforesaid discretion is clearly indicated by the power of the Court to order attendance of the maker of the report despite its due service. This discretion was in fact, explained in the case of *Mt. Gaya Kunnar v. The Emperor* AIR [1934] Oudh 62. Where a conviction would appear to depend in some material way as in the instant case, on the opinion of the chemist, no accused person can be denied the right, to cross-examine him. In the case of *Emperor v. Happu* [1933] 20 AIR All 837, the Court described the use of a chemist's report without cross-examination under s. 510 of the Indian Criminal Procedure Code (similar somewhat to our s. 399 of Criminal Procedure Code) as a dangerous practice. For these reasons, the provisions of s. 399 appear to be an imperative enactment which imposes a duty on the prosecution, for the benefit of accused persons, to call the chemist for cross-examination when so required. The conclusion, in my view, is inevitable, that if a chemist's report is admitted in contravention of the provisions of s. 399, it will be an irregularity of a serious nature, and the chemist's report in such circumstances is inadmissible evidence despite its admission and the Court in question would have to eradicate such inadmissible evidence from its mind completely.

The chemist's report in the circumstances in the instant case was inadmissible evidence. This was the view of Syed Othman Ali J (as he then was) on similar facts in *Mohamed bin Abdul Rahman v. Pendakwa Raya* [1979] 1 MLJ 252; column C & D at p. 253. With the greatest respect, I agree with it.

I would further hold however, that the chemist's report in the instant case has throughout, after its admission, remained inadmissible without undergoing any mutation, whether the calling of the chemist was waived by silence or inaction of an accused, or not, and this Court is perfectly entitled, sitting on appeal, to consider afresh the objection regarding its admission. Were it otherwise, it could cause injustice in a number of situations e.g. in the case of an unrepresented accused, who, more often than not, is thoroughly bewildered by the procedure and rules of evidence of the Court.

Further, I believe views of similar kind could have been a premise on the basis of which the learned Jude in *Ang Chwee Keng v. Regina* [1955] MLJ 37 exhorted as follows: to quote:

> It has, moreover, been repeatedly stated that in criminal cases, Judges should not wait for objections to inadmissible evidence to be taken but should intervene to prevent such evidence being given ...

Further, a waiver was described by Lord Denning in *Charles Rikards Ltd. v. Oppenhaim* [1950] 1 KB 616, as, in fact, a kind of estoppel, which could have been applied in this way, i.e. the defence Counsel made a promise not to insist on his legal right to have the chemist called for cross-examination, and the promise was acted on by the prosecution; the defence could not go back on it. I do not think a waiver or an estoppel can be raised against s. 399 of the Criminal Procedure Code which imposes a duty on the prosecution to call the chemist as a witness, for the benefit of accused persons who form a section of the public. Please see *Public Textile Bhd. v. Lembaga Letrik Negara* [1976] 2 MLJ 58 FC, and similarly *Kok Hoong v. Leong Cheong Kweng Mines Ltd.* [1964] MLJ 49, *Maritime Electric Co. Ltd. v. General Dairies Ltd.* [1937] AC 610.

Further, I do not think, that, as a corollary from what is stated just now, a waiver by an accused person can be held against him in regard to rules of procedure and evidence in all criminal proceedings. Any admission of inadmissible evidence even with consent or by a waiver of the defendant is wrongful and such inadmissible evidence remains inadmissible evidence, the effect of which is open to any Court to assess.

Without the chemist's report, which I have just held to be inadmissible evidence, there was no sufficient evidence to justify the conviction. Would s. 422 of the Criminal Procedure Code however be able to maintain the conviction? Section 422 reads:

> 422 - Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account-
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> > of any error, omission or irregularity in the complaint, summons, warrant, charge, judgment or other proceedings before or during a trial, or in any inquiry or other proceeding under this Code; or of the want of any sanction required by s. 129; or of the omission to settle or revise any list of jurors or assessors; of the want of qualification of any juror or assessor; or of the improper admission or rejection of any evidence; or of any misdirection in any charge to jurors or assessors;
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> unless such error, omission, improper admission or rejection of evidence, irregularity; want of misdirection has occasioned a failure of justice.

Recourse to s. 422 by the prosecution is expressly subject to no failure of justice being occasioned. In *Wong Kok Keong v. Regina* [1955] MLJ 13, 15 Spencer Wilkinson J said: "When does the improper admission of evidence occasion a failure of justice? *Prima facie* I think it would occasion a failure of justice if it resulted in a decision different from that which would have been given had the evidence not been admitted." Section 422 would not help the prosecution either.

I therefore allow the appeal, set aside the conviction and sentence, and the fine, if paid, is to be refunded to the defendant.

Also found at [1987] 1 CLJ 386